

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLEE**

To be argued by
MALCOLM A. HOFFMANN

76-7262

United States Court of Appeals
FOR THE SECOND CIRCUIT

HAROLD S. LEE, ERIC LEE and LESTER LEE,
Plaintiffs-Appellees,

—v.—

JOSEPH E. SEAGRAM & SONS, INC.,
Defendant-Appellant.

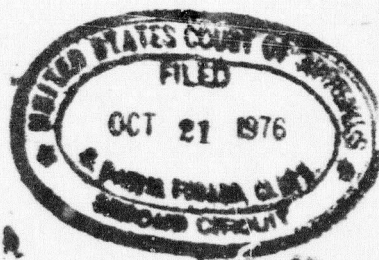
ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR PLAINTIFFS-APPELLEES

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BRIEF FOR PLAINTIFFS-APPELLEES

Counter-Statement of the Issues Presented for Review

1. Does the record support the trial court's conclusion that defendant-appellant did not meet the standards imposed upon movants seeking judgment notwithstanding the verdict?
2. Does the record support the jury's and trial court's finding that New York's parol evidence rule does not apply to a collateral oral agreement to relocate part-owners of a liquor distributorship?
3. Does the record support the jury's and trial court's finding that the collateral oral agreement was sufficiently definite as to be enforceable?

4. Does the record support the jury's and trial court's assessment of damages caused by the breach of the collateral oral agreement?

Counter-Statement of the Case

In its memorandum of July 10, 1975, submitted below in support of its motion under Fed. R. Civ. P. 50(b) defendant-appellant conceded at the outset (page 2):

Defendant's motion is *not* predicated upon any contention that there was *no* disputed issue of fact upon which reasonable men could differ. To the contrary, defendant's claim is that, as a matter of law, plaintiffs wholly failed to plead or offer any competent evidence to support material elements of their breach of contract claim, elements which were essential to make a *prima facie* case permitting submission to the jury. . . . In this context, defendant's motion is in no way dependent upon the credibility of its witnesses or documentary evidence [emphasis in original].

Indeed, in his memorandum opinion of April 26, 1976 (94a-122a) Judge Charles H. Tenney, who presided at the trial, made that concession of defense counsel a focal point of his rulings. He quoted it verbatim (98a) and stated immediately thereafter that his rulings were made "[w]ith the standards previously enunciated [governing motions for judgment n.o.v.] and the defendant's above-mentioned claim clearly in mind" (98a). Judge Tenney's opinion is officially reported at 413 F. Supp. 693.

Defendant-appellant seemingly has made a verbal glissade away from this concession because all arguments made

in its latest brief premise that this Court somehow is bound to accept its factual version of the oral contract, the terms thereof and the damages award. For example, it now argues that "[t]he only evidence of the claimed oral agreement was the deposition of Harold Lee" (p. 3) and that Mr. Lee's testimony was "unequivocally denied" by two of its representatives (pp. 3-4).

In any event, the brief of defendant-appellant almost completely disregards hard facts of record which must defeat its present arguments. Seemingly, this drastic shift in emphasis in the briefing is designed to persuade this Court that the appeal raises issues other than as to the weight of the evidence. However, the reality is that the appeal raises only such garden-variety issues of fact instead of epochal legal issues as to the parol evidence rule and illusory promises as defense counsel contend.

A. The Parties and Prior Proceedings

On January 20, 1972 this action was commenced in the United States District Court for the Southern District of New York by plaintiffs-appellees Harold S. Lee and his two sons Lester and Eric (sometimes "the three Lees") (7a-16a). In 1962 Harold Lee took over the management of Capitol City Liquor Company, Inc. ("Capitol City"), a distributor of alcoholic beverages in Washington, D. C. The three Lees eventually acquired 50% of Capitol City's stock and the remaining 50% was acquired by Harold's brother, Henry, and his son Arthur. All five members of the two Lee families (sometimes "the five Lees") became officers and directors of Capitol City.

As of 1962 Harold Lee was 63 years old, a thirty-year employee of defendant-appellant Joseph E. Seagram &

Sons, Inc. ("Seagram") and since 1958 the head of its prestigious Calvert division. Seagram is the leading distiller of alcoholic beverages in the United States. Historically, Seagram supplied Capitol City with approximately 80% of its total purchases of alcoholic beverages (161a). In addition, Seagram itself had sold Harold Lee his initial 49% stock interest in Capitol City in 1959 pursuant to its practice of placing key employees in distributorships.

In the first two claims of their amended complaint (24a-30a) the three Lees alleged that Seagram had breached an oral agreement entered into in May 1970 whereunder Seagram agreed to relocate Lester and Eric Lee in an acceptable distributorship having approximately half the size and worth of Capitol City. The oral agreement was alleged to be collateral to their sale to Seagram of their 50% interest in Capitol City's assets and good will and was to be performed by Seagram within a reasonable period of time. In written agreements dated August 18, 1970 and August 25, 1970 (Pl. Exs. 7-8, E 32-39)* ("Sales Agreement") the sale of Capitol City's assets and good will to Seagram by the five Lees was formally agreed to and then amended. The sales transaction was formally closed on September 30, 1970. Seagram never fulfilled its promise to relocate Lester and Eric Lee.

Neither Seagram's brief nor its Table of Contents to the Joint Appendix reflects the critical procedural fact that on June 11, 1975 the trial court denied Seagram's

* The prefix "E" references pages of Exhibit Volume of the Joint Appendix.

motion seeking summary judgment* based upon these two rulings which now are of central importance on this appeal:

(a) "the determination as to whether the parol evidence rule even applies . . . must await the taking of evidence as to whether the written Sales Agreement was intended to be a complete and accurate integration of all of the mutual promises of the parties" (86a); and

(b) a trial also was required to resolve "the very real dispute over the nature and terms of the alleged oral contract, as well as the circumstances under which it was allegedly made" (87a).

Seagram ignored these two key rulings as to the scope of the trial. Indeed, its only trial witness was but one of several Seagram representatives who had contemporaneous knowledge concerning whether the Sales Agreement was intended to integrate all mutual promises and concerning the nature, terms and surrounding circumstances of the oral agreement. Seagram did not call the lawyer who drafted the Sales Agreement on its behalf even though he was present in the courtroom throughout the trial.

The contract claims only were submitted to the jury on June 24, 1975, the trial court having dismissed the anti-trust claims at the close of plaintiffs' case. After several

* The Table of Contents erroneously indicates that "Memorandum of Tierney, J." is reported at pages 83a-122a. In fact:

- (1) Judge Tenney's June 11, 1975 opinion is reported at 83a-90a;
- (2) a stipulation concerning Harold Lee's deposition testimony is reported at 91a-92a;
- (3) the judgment appealed from of June 30, 1975 is reported at 93a; and
- (4) the memorandum opinion appealed from of April 26, 1976 is reported at 94a-122a.

hours of deliberation at the end of a six-day trial, the jury returned a verdict in favor of the three Lees in the amount of \$407,850. Judgment was entered on June 30, 1974 (93a). On April 26, 1976 the trial court denied Seagram's motion for judgment notwithstanding the verdict (94a-122a).

B. Facts Found by the Jury and by the Trial Court

1. Facts of Record Concerning Whether the Parties Intended That the Written Sales Agreement Be a Complete and Accurate Integration of All Mutual Promises

Seagram ignored the clear directive of the trial court that evidence be produced concerning the parties' intent as to "whether the written Sales Agreement was . . . to be a complete and accurate integration of all of the mutual promises" (86a). Jack Yogman—Seagram's executive vice president and its only trial witness—repeatedly denied that he played any role in the Capitol City negotiations which might have given him such knowledge. He emphasized that his only participation in the Capitol City sale consisted of a very casual and brief corridor meeting with Harold Lee and Seagram controller Harold Fieldsteel in July of 1970 (339a-341a, 351a-353a, 370a, 382a-384a, 426a-433a). In fact, Seagram's evidence showed that even on its side the participants in the two negotiations were completely different. Mr. Yogman went out of his way to testify that Mr. Fieldsteel had primary responsibility for the Capitol City negotiation with the five Lees (138a, 339a, 352a-353a, 381a-382a, 414a, 422a) whereas Fieldsteel had nothing whatever to do with relocating the three Lees (384a-385a).

In addition to Mr. Fieldsteel, other potential Seagram witnesses with contemporaneous knowledge about the in-

tent of the parties as to integration included Seagram's general counsel E. Vincent O'Brien. He was identified as a key participant in the Capitol City negotiations (145a-147a, 414a-416a) but a non-participant in the relocation negotiations. As Seagram's legal draftsman in the Capitol City sale, Mr. O'Brien was preeminently qualified to testify about why the Sales Agreement had no integration clause. His presence in the courtroom throughout the trial makes his failure to testify incomprehensible. The simple fact is that O'Brien did not insert an integration clause into the Sales Agreement and his failure to do so is meaningful.

Neither did Seagram call financial experts in its organization who also played key roles in the Capitol City negotiations, including Seagram Vice President John Barth who had detailed contemporaneous knowledge highly pertinent to the issue of integration (219a-225a, 390-403a).

In complete contrast, the three Lees established through their evidence that the parol evidence rule simply did not apply to this case. Lester Lee testified as to the significance of an "integration clause" based upon his expertise as a business broker (165a-166a). Both Eric and Lester Lee testified that the August 1970 Sales Agreement (Pl. Exs. 7-8, E 32-39), had no integration clause (166a-167a, 232a) and, conversely, that Seagram's standard franchise and guaranty agreements (Pl. Exs. 10-11, E 40-58; Pl. Ex. 51, E 104-106) do contain such clauses (232a).

The record also shows that the prior relationship between the parties and the surrounding circumstances as of 1970 and 1971 demonstrated that it was not, and could not have been, within the parties' expectations either to integrate the relocation agreement into the Sales Agreement or to embody the relocation agreement in a separate writing. The

three Lees were the parties to the relocation agreement whereas the five Lees were parties to the sale of Capitol City. The Lees testified that Yogman alone conducted the relocation negotiations with the three Lees (128a-136a, 177a-178a) whereas Fieldsteel, Barth, O'Brien and a completely different Seagram team handled the Capitol City sale. Harold Lee had a long, a mutually beneficial association with Seagram (124a-126a, 146a-147a, 162a-163a) and also a long-standing relationship of mutual trust and confidence with Mr. Yogman (129a-130a, 139a)—a key fact which Yogman himself readily acknowledged (333a, 373a-374a, 436a). Harold Lee testified that he did not retain counsel in negotiating the Capitol City sale with Seagram because "I thought that my relationship with the company was such that I shouldn't have to protect myself" (146a).

Further, to Harold Lee's knowledge Seagram frequently placed its former officers and employees in Seagram distributorships. This is what Seagram did in 1959 when it sold a 49% interest in Capitol City to Harold Lee and it is what occurred in 1970 when Seagram made the necessary arrangements for the eventual purchase of Capitol City by Chester Carter, one of its ranking employees (336a, 351a-352a). Seagram also made comparable arrangements with respect to 11 other Seagram houses, including the Providence house which Seagram elected to hold for one of its Boston distributors instead of for the three Lees (344a).

Moreover, the oral agreement was made in context of Seagram's franchise agreements which gave Seagram the right to approve or reject in advance the transferee of any Seagram franchise (140a, 164a-165a, 181a, 235a, 257a-259a, 260a-262a, 264a-265a, 267a-268a). Mr. Yogman was forced to admit that Seagram vigorously enforced this right. It did so as concerns the Paley house, in Providence, Rhode Island, to the great detriment of the three Lees (140a-142a,

168a-169a, 171a, 206a-207a, 244a-245a, 260a-265a, 336a-338a, 344a-350a, 354a-355a, 384a-385a). In Yogman's words, "the Paley house was being reserved for one of the Boston distributors" (344a). Moreover, Seagram was the largest distiller in the United States (164a, 225a-226a, 235a, 330a-331a, 332a-333a, 426a) and some 80% of Capitol City's sales were Seagram brands (161a).

Finally, as we shall now show, the record fully supports the jury's finding that the oral agreement was collateral to the Sales Agreement. That circumstance also refutes Seagram's contention that the parties intended that the Sales Agreement fully integrate all of their promises.

These same undisputed facts of record also fully support the trial court's ultimate conclusion (112a):

[T]he Court concludes that the written contract contained the entire agreement of the parties with regard to the sale of the assets of Capitol City, but that the oral agreement was not so clearly connected with that transaction as to be part and parcel of it. The oral agreement was collateral and was not inconsistent with the terms of the writing.

In fact, that ultimate conclusion was preceded by the trial court's meticulous review of the record in terms of the parties' contentions (103a-108a) and the differences between written agreements as concerns subject matters (110a-111a) and the parties and negotiators (111a). The trial court also reviewed Seagram's omission of its normally-used integration clause (111a) and the 30-year employment of Harold Lee by Seagram and their "oft-expressed mutual regard which . . . lead to the conclusion that the agreement to relocate was more likely to be sealed with a handshake than with a pen" (111a-112a).

**2. Other Facts of Record Concerning the Nature,
Terms and Surrounding Circumstances of the
Oral Contract to Relocate**

Seagram almost completely ignored the trial court's directive that the trial be used as a means of resolving "[t]he very real dispute over the nature and terms of the alleged oral contract, as well as the circumstances under which it was allegedly made" (87a). The record shows that this dispute was resolved in the three Lees' favor by the jury on the basis of highly credible testimony.

The three Lees testified that the Capitol City negotiations were initiated by Harold Lee during June of 1970 (128a-130a, 150a, 389a, 403a, 409a) and that Seagram's agreement to relocate the three Lees was a condition to the sale of Capitol City (130a-132a, 133a-135a, 137a-138a, 178a, 196a, 236a-237a). There is also highly credible testimony that the agreement was specifically reaffirmed by Yogman on numerous later occasions, including at an important meeting held on June 22, 1971, when Yogman accepted July 31, 1971 as a "deadline" for his "commitment" according to Harold Lee (149a-151a), Lester Lee (171a-173a, 218a-220a) and Eric Lee (242a-243a).

Conversely, there was ample reason for the jury to disbelieve Seagram's conflicting version of the relocation agreement. In particular, the jury easily could find incredible Yogman's flat statement that "there were no conditions whatsoever" attached to the Capitol City sale (334a-335a, 346a-347a, 350a-351a, 363a-364a). Also incredible was his testimony that the subject of relocation first arose, most casually, late 1970 or early 1971 (some months *after* the Capitol City closing of September 30, 1970), a time sequence he could fix with precision because he specifically

remembered Harold Lee stating "the boys were sitting around" (341a-342a). This testimony was rocked by cross-examination so that the jury had every reason to reject it (371a-372a, 429a-430a, 434a-435a).

Equally incredible was Yogman's testimony that his later relocation discussions with Harold Lee arose most casually during Harold's unexpected interruptions of his busy business day. For example, he stated (371a, 374a):

He would just come up in the morning and without appointment and just show up.

* * *

. . . [F]rankly, he took so much of my time that I discouraged his staying for any length of time, because I had other things to do besides talking to Harold Lee.

The jury obviously disbelieved deposition testimony by Seagram's Barth which was carefully couched in terms designed to create the impression that the Great Wall of China separated Seagram's negotiators on the Capitol City sale and on the relocation of the three Lees (219a-229a, 390a-430a). Particularly incredible was Barth's testimony that he—and not Harold Lee—initiated the Capitol City sale (220a-227a, 390a-398a).

Hard facts of record also support the jury's rejection of Seagram's contention that the oral agreement was too vague and indefinite to be enforceable. For example, the oral agreement which the jury found to exist was very precise and definite as to its subject matter of a Seagram distributorship. Eric Lee testified (234a):

It was my understanding that they [Seagram] would put us in touch with distributors who were willing to sell their businesses, and upon the consummation of the deal, they would agree to the transfer of their franchises to the new owners.

* * *

It was my understanding that the profits, the profit potential, would be roughly half of that of Capitol City. . . . Roughly half the selling price of Capitol City, although we were prepared to purchase a larger house, we could get additional financing, and we would not rule out a smaller house if the profit potential was there.

Seagram made no attempt whatever during the trial to contradict this testimony and similar testimony to the same effect by Eric Lee (248a-249a), Lester Lee (172a-173a, 201a-204a) and Harold Lee (131a-136a, 140a, 143a-144a, 147a-154a). Instead, after disavowing these facts of record, Seagram attempted to convince the jury that terms of the oral agreement were sufficiently vague or indefinite to prevent their enforcement. However, the record makes it equally clear that even that more limited argument cannot help Seagram. For example, it shows that substantial numbers of Seagram houses became available for sale during the period following September 30, 1970, the closing date of the Capitol City sale (196a-197a, 207a, 237a-239a). Seagram admitted that there was a total of 41 such houses between 1970 and 1974 (167a-169a; Pl. Ex. 49, E 96-100). The problem was not that an insufficient number of Seagram houses became available but instead that Seagram did not notify the three Lees of their availability nor help

them to obtain the distributorship (218a, 240a). Many of these houses were geographically acceptable to the Lees (132a, 197a-200a, 214a-215a) and by mid-1971, as Eric Lee testified, "almost any location in the continental United States would have been worth looking into" (239a).

The record also is very clear that there was no vagueness about price (173a, 203a-204a, 234a-235a, 248a-249a). It was, as noted, to be approximately half of the selling price of Capital City. By Seagram's own admission there could be no vagueness about price (186a, 243a-245a, 268a-269a, 353a-354a). In Yogman's words (268a-269a):

There is a rule of thumb in the industry—this is not us particularly, but normally a distributorship's value is book value plus three times last years' profit after taxes—three times the last profit after taxes.

The record also shows there was no ambiguity as to the time of performance. The oral agreement had to be performed within a year of the September 30, 1970 closing of the Capitol City sale according to the testimony of all three Lees (146a-150a, 172a-173a, 218a-219a, 242a-243a, 387a-389a, 416a-417a).

The foregoing facts of record also support in full the ultimate conclusion of the trial court that the oral contract "was sufficiently certain to render it susceptible of enforcement" (103a). It was preceded by careful analysis of the facts of record in terms of the parties' contentions (98a-99a, 102a), clarity of the subject matter and time for performance (102a), "a body of extrinsic data" which "could well have filled any existing gaps" (102a), and duties imposed on the three Lees (103a).

ARGUMENT

POINT I

The trial court properly concluded that Seagram failed to meet the standards imposed upon movants seeking judgment n.o.v.

The foregoing facts of record show that Seagram did not and could not overcome the stringent standards imposed upon parties seeking the extraordinary relief of the setting aside of a jury verdict. As the trial court held, these standards—together with Seagram's concession that "there was no disputed issue of fact upon which reasonable men could differ" (98a) (emphasis in original)—were of pivotal importance to all branches of Seagram's post-trial motion.

Indeed, Seagram's withdrawal of that concession on this appeal now should be ignored. To permit it to challenge the facts of record underlying the verdict for the first time on this appeal would violate the fundamental rule that a litigant should not be permitted to maintain mutually contradictory positions within the framework of the same lawsuit. The rationale for this rule was stated as follows by this Court in *Terkildsen v. Waters*, 481 F.2d 201, 204-05 (2d Cir. 1973) in response to a contention (as to pre-judgment interest) which was not raised below:

Under these circumstances, we see no reason to depart from the general rule of practice which forecloses appellate consideration of issues not raised below. See, e.g., *Hormel v. Helvering*, 312 U.S. 552, 556, 61 S.Ct. 719, 85 L.Ed. 1037 (1941). Adherence to the rule is particularly apt where, as here, factual questions may

have been implicated as to which the judge made no findings because the issue was not directly raised and equally, where considerations underlying a subtle legal issue could have been exposed and distilled by the able district judge so as to facilitate more informed consideration by this court. . . . Accordingly, we decline to consider an issue so belatedly raised.

As was stated in *Scarano v. Central R. Co.*, 203 F.2d 510, 512-13 (3d Cir. 1953):

[It] is sometimes said to be a general rule that "a party to litigation will not be permitted to assume inconsistent or mutually contradictory positions with respect to the same matter in the same or a successive series of suits." II Freeman on Judgments §631 (5th Ed. 1925).

See also *Davis v. Wakelee*, 156 U.S. 680, 689 (1895); *Jamison v. Garrett*, 205 F.2d 15, 17 (D.C. Cir. 1953); *Lummus Co. v. Commonwealth Refining Co.*, 280 F.2d 915, 928 (1st Cir. 1960); *Roth v. McAllister Bros., Inc.*, 316 F.2d 143, 145 (2d Cir. 1963); *Holcomb v. Aetna Life Insurance Co.*, 255 F.2d 577 (10th Cir. 1958); *Jones v. Central of Georgia Ry. Co.*, 331 F.2d 649 (5th Cir. 1964).

However, even aside from Seagram's sweeping concession below that it did not dispute the facts, Seagram manifestly cannot hope to meet the standards which must be met in order to have the verdict set aside. As the trial court stated (96a):

The Court may grant the motion "only when, without weighing the credibility of the evidence, there can be but one reasonable conclusion as to the proper judg-

ment." 5A J. Moore, Federal Practice ¶50.07[2], at 2356. See also *Jack Cole Company v. Hudson*, 409 F.2d 188, 191-92 (5th Cir. 1969); *Rice v. Atlantic Gulf & Pacific Co.*, 59 F.R.D. 280, 282 (S.D.N.Y.), aff'd in part, rev'd in part, 484 F.2d 1318 (2d Cir. 1973).

The trial court cited in support of that proposition the following excerpt from this Court's decision in *Armstrong v. Commerce Tankers Corp.*, 423 F.2d 957, 959 (2d Cir.), cert. denied, 400 U.S. 833, 91 S.Ct. 67 (1970):

. . . The motion will be granted only if (1) there is complete absence of probative evidence to support a verdict for the non-movant or (2) the evidence is so strongly and overwhelmingly in favor of the movant that reasonable and fair minded men in the exercise of impartial judgment could not arrive at a verdict against him. . . .

In addition to the authorities cited by the trial court see *Simblest v. Maynard*, 427 F.2d 1 (2d Cir. 1970); *Hale v. Holy Cross Hospital Inc.*, 513 F.2d 315 (5th Cir. 1975); *Alabama Great Southern R. Co. v. Chicago & N.W. Ry. Co.*, 493 F.2d 979 (8th Cir. 1974); *Levin v. Wear Ever Aluminum, Inc.*, 442 F.2d 1307 (3d Cir. 1971).

Conversely, as the trial court also stated (96a-97a):

[T]he Court is "bound to view the evidence in the light most favorable to [the party opposing the motion] and to give it the benefit of all inferences which the evidence fairly supports, even though contrary inferences might reasonably be drawn." *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 696

(1962). Finally, since the grant of the motion would deprive a litigant of the opportunity of having the issues determined by a jury, the motion should be "cautiously and sparingly granted." 9 Wright & Miller, Federal Practice and Procedure §2524, at 542.

See also, *Lebrecht v. Bethlehem Steel Corp.*, 402 F.2d 585 (2d Cir. 1968); *Sulmeyer v. Coca Cola Co.*, 515 F.2d 835 (2d Cir. 1975); *Griggs v. Firestone Tire and Rubber Co.*, 513 F.2d 851 (8th Cir. 1975); *Cockrum v. Whitney*, 479 F.2d 84 (9th Cir. 1973). As the Supreme Court emphasized long ago in *Tennant v. Peoria & P. U. Ry. Co.*, 321 U.S. 29, 35, 64 S.Ct. 409, 412 (1944):

It is the jury, not the court, which is the fact-finding body. It weighs the contradictory evidence and inferences, judges the credibility of witnesses, receives expert instructions, and draws the ultimate conclusion as to the facts. The very essence of its function is to select from among conflicting inferences and conclusions that which it considers most reasonable. . . . Courts are not free to reweigh the evidence and set aside the jury verdict merely because the jury could have drawn different inferences or conclusions or because judges feel that other results are more reasonable.

These propositions are particularly pertinent here because Seagram in effect contends that a court of appeals is empowered literally to retry the facts of the case without giving the slightest weight to the findings of both the jury and trial court. As the Supreme Court stated, "when an issue is once litigated and decided, that should be an end

of the matter." *United States v. United States Smelting, Refining & M. Co.*, 339 U.S. 186, 198, 70 S.Ct. 537, 544 (1950).

POINT II

The record does not support Seagram's resuscitated argument about the parol evidence rule.

Responsive to contentions made in a prior Seagram brief which are repeated almost verbatim in its present brief (Point I, pp. 5-21) the trial court denied Seagram's motion seeking summary judgment based upon the New York parol evidence rule, ruling instead (86a):

. . . [T]he determination as to whether the parol evidence rule even applies in this case must await the taking of evidence as to whether the written Sales Agreement was intended to be a complete and accurate integration of all of the mutual promises of the parties.

Having clearly spelled out that test in its opinion, the trial court so charged the jury (453a):

Now, plaintiffs contend that the relationship of Harold Lee to defendant was such as to lead to the reasonable inference that the alleged oral agreement was made even though it was never set forth in writing and even though the particulars, such as cost of locations, may not have been spelled out in detail. Defendant, on the other hand, contends that, since all of the other agreements of the parties were put into writing, it is reasonable to infer that the terms of this alleged agreement would also have been

set forth in a writing. You may consider these contentions, together with all of the other evidence in the case relevant to the issue, in determining whether the alleged agreement was made.

And, if you find the oral agreement containing the terms that plaintiffs contend that it contained or made, you are to consider that agreement just as binding as if it had been put into writing. . . . *

The jury clearly found that the Sales Agreement was not—in the trial court's words—"intended to be a complete and accurate integration of all the mutual promises of the parties" (86a) and it is clear also that it was amply justified in so finding. The record as it stands demonstrates that the parol evidence rule simply does not apply here. See pages 6-9, *supra*.

Seagram does not even now challenge the propriety of this jury finding nor could it do so in face of its failure to call as trial witnesses any Seagram participants in the Capitol City negotiations with the five Lees having contemporaneous knowledge about intent as to "a complete and accurate integration". In fact, Seagram's failure to call to the stand its counsel E. Vincent O'Brien—who as draftsman of the Sales Agreement was best qualified to explain its omission of Seagram's frequently-used inte-

* Seagram's failure to make timely objection to this charge fairly can be construed to reflect the realization that it was entirely proper. *Pickens Kane Moving & Storage Co. v. Aero Mayflower Transit Co.*, 468 F.2d 490, 492 (7th Cir. 1972). Moreover, Rule 51 now operates to bar such a challenge on this appeal. Its requirement that timely and specific objections be made is to give the trial court an opportunity to correct any erroneous instructions before the jury retires and thus avoid inadvertent mistakes which might require a new trial. *Piechoski v. Grace Lines Inc.*, 409 F.2d 66, 69 (3d Cir. 1969).

gration clause and who was present in the courtroom during the trial—created the presumption that his testimony would have been highly unfavorable to Seagram. As was stated with respect to a comparable situation in *Interstate Circuit, Inc. v. United States*, 306 U.S. 208, 228, 59 S. Ct. 467, 474 (1939):

. . . The failure under the circumstances to call as witnesses those officers who did have authority to act for the distributors and who were in a position to know whether they had acted in pursuance of agreement is itself persuasive that their testimony, if given, would have been unfavorable to appellants. The production of weak evidence when strong is available can lead only to the conclusion that the strong would have been adverse. . . . Silence then becomes evidence of the most convincing character. . . .

In particular, Seagram cannot hope to prevail on the parol evidence issue because it cannot overcome facts of record showing that its negotiations for Capitol City were with the five Lees whereas its agreement to relocate was with the three Lees (pages 7-8, *supra*).* Seagram contends that there is a "single, indivisible transaction" (Brief, p. 14) but the reverse is true because of the "formally different parties." It was held in *Rudman v. Cowles Communications, Inc.*, 30 N.Y. 2d 1, 13, 330 N.Y.S. 2d 33, 42 (1972):

The trial court concluded that each agreement was a "separate and independent transaction." This resolution appears correct. Although form is not conclu-

* Seagram cites no case, and counsel for the three Lees know of no case, applying the parol evidence bar where the parties to the written and oral agreements were different.

sive, that the parties entered into separate written agreements with "separate assents" rather than a "single assent" is influential. . . . Recognizing that the agreements involved formally different parties, and actually [were] executed in different dates in June, 1966, the conclusion of separateness becomes all but inescapable.

Perhaps the most widely-quoted description of the New York parol evidence rule is found in *Mitchill v. Lath*, 247 N.Y. 377, 380-81, 160 N.E. 646 (1928):

Under our decisions before such an oral agreement . . . is received to vary the written contract, at least three conditions must exist: (1) The agreement must in form be a collateral one; (2) it must not contradict express or implied provisions of the written contract; (3) it must be one that parties would not ordinarily be expected to embody in the writing, or, put in another way, an inspection of the written contract, read in the light of surrounding circumstances, must not indicate that the writing appears "to contain the engagements of the parties, and to define the object and measure the extent of such engagement." Or, again, it must not be so clearly connected with the principal transaction as to be part and parcel of it.

Applying the *Mitchill* tests here, the New York parol evidence rule simply did not apply to Seagram's oral agreement because the record shows that (1) it was "collateral" in form, (2) it did "not contradict express or implied" written provisions, and (3) it was the kind of agreement which "the parties would not ordinarily be expected to

embody in the writing" and it met the two remaining alternative conditions of (3).

Indeed, Seagram does not seriously dispute that the three Lees met conditions (1), (2) and the first two alternative conditions of (3). Its argument that the oral agreement "was not collateral" (Brief, pp. 13-14) consists only of a rehash of its theme that the Lees' obligation "was the same under both the written and alleged oral agreement" and misleading analyses of two affidavits never brought to the jury's attention (pp. 28-30, *infra*). Its argument about supposed contradictions (pp. 12-13) consist only of a bare statement of the proposition of law and the conclusory statement that the oral agreement "enlarged" or "varied" (*not* truly contradicted) Seagram's written obligations. Its argument as to whether the parties could be expected to use a writing is found only in a caption (p. 9) and in a bare statement of the proposition of law (pp. 9-10).

Thus the focus of Seagram's contentions concerning the parol evidence rule actually is upon its version of the third alternative condition of (3) in *Mitchill*—concerning whether the oral agreement was "part and parcel" of the "principal transaction" (247 N.Y. at 381, 160 N.E. at 647)—and upon its dictum concerning "the inducing cause" for real estate leases (247 N.Y. at 382, 162 N.E. at 648):

All [four cited cases] had that an oral stipulation, said to have been the inducing cause for the subsequent execution of the lease itself, concerning some act to be done by the landlord, or some condition as to the leased premises, might not be shown. In principle they are not unlike the case before us.

That these contentions raise run-of-the-mill questions as to the weight of the evidence rather than abstract questions of law is confirmed by the facts of record (pp. 6-13, *supra*) and by Seagram's quarrel (Brief, p. 5) with the trial court's ultimate conclusion (112a)

that the written agreement contained the entire agreement of the parties with regard to the sale of the assets of Capitol City, but that the oral agreement was not so clearly connected with that transaction as to be part and parcel of it. The oral agreement was collateral and was not inconsistent with the terms of the writing.

The factual nature of Seagram's contentions also is evidenced by its later quarrel (Brief, pp. 17-20) with these key factual findings (111a) which—as our record annotation show—are fully supported by the trial record:

(a) "First, the parties to the two agreements were different" (Pl. Exs. 7-8, E 32-39; 126a-138a, 177a-179a, 231a-232a);

(b) "Second, the defendant was represented in the negotiation of the oral contract by Mr. Yogman alone, while the written contract was negotiated for defendant by Messrs. Barth, O'Brien and Fieldsteel. Yogman took no part in the latter negotiation" (Pl. Exs. 14, 16, E 62-64; 135a-139a, 143a-144a, 146a, 177a-179a, 338a-342a, 351a-352a, 382a-384a, 414a-416a, 426a-428a);

(c) "Next, the written contract between the parties contained no integration clause, although several other agreements between them did contain such a clause" (Pl. Exs. 7-8, E 32-39; Pl. Exs. 10-11, E 40-57, Pl. Ex. 51, E 104-06; 165a-167a, 231a-232a).

The record also fully supports this key finding which Seagram failed to challenge even though it followed immediately thereafter (111a-112a):

"Finally, the thirty year employment history of Harold Lee with defendant and the oft-expressed mutual regard which the parties had for each other lead to the conclusion that the agreement to relocate was more likely to be sealed with a handshake than with a pen" (124a-125a, 139a, 146a, 162a-163a, 237a, 333a, 373a-375a, 436a).

Seagram cannot prevail under the parol evidence rule, even if this Court should view these holdings as being ultimate conclusions of law rather than findings of fact. As the trial court held, "there is nothing in the written Sales Agreement, standing alone, which would suggest that it was intended to be 'the entire agreement of the parties'" (86a). The quoted language was found in the written integration clause used in *Gem Corrugated Box Corp. v. National Kraft Container Corp.*, 427 F.2d 499, 501, 503 (2d Cir. 1970), where this Court held that there was no parol evidence bar despite the clause. The case against application of the parol evidence rule is far stronger here because it involves the very different recital that the August 18, 1970 agreement was amended in consideration of the mutual promises therein and "other good and valuable consideration, the receipt of which is hereby acknowledged" (Pl. Exs. 7-8, E 32-39 at E 38). In *Producers Livestock Loan Co. v. Idaho Livestock Auc.*, 230 F.2d 892 (9th Cir. 1956), oral testimony was admitted to show the parties' intent as to such a recital, and in *Nord v. Ruderman*, 34 A.D. 2d 555, 309 N.Y.S.2d 709 (2d Dep't 1970), it was admitted

to show the meaning of the recital "among other things" preceding the detailed terms of a stockholders' agreement.

Seagram's argument that the oral argument in *Gem Corrugated* "neither preceded nor was contemporaneous with the written requirements contract" (Brief, p. 20) misconstrues the nature of the oral agreement in *Gem Corrugated* in precisely the same manner as it misconstrues the oral agreement here: Both oral agreements manifestly were not actual sales agreements but instead were agreements to provide an opportunity to buy. Seagram's analysis (Brief, pp. 20-21) also ignores the fact that the subject matters of both oral agreements were different from, and at least as important as, the subjects of the written agreements. That the parol evidence rule simply does not apply in such situations is established by the holding in *Mitchill*—and quoted in *Gem Corrugated* (427 F.2d at 503)—that the oral agreement's subject matter "must not be so clearly connected with the principal transaction as to be part and parcel of it" (247 N.Y. at 381). As was pointed out in *Gem Corrugated* (427 F.2d at 503):

[D]efendants' reliance upon the parol evidence rule is misplaced, for the [oral] stock agreement and not the [written] requirements contract was the "principal transaction."

That holding is dispositive here. The record shows that it was of prime importance to the three Lees to obtain the promised distributorship, a *res* entirely different from and unrelated to the subject matter of the writing. As *Gem Corrugated* makes clear, the parol evidence rule acts to prevent the tail [the relatively unimportant agreement]

from wagging the dog [the more important agreement] and, conversely, it has no application whatever to a situation where, as here, a promisor attempts to prevent the dog from wagging the tail.

Seagram relies almost entirely upon tail-wagging-dog cases concerned with relatively unimportant oral agreements of kinds which normally are included in detailed written agreements covering the sale or lease of real estate. In *Mitchill v. Lath*, 247 N.Y. 377, 160 N.E. 646 (1928) (Seagram Brief, pp. 9-13), there was a written sales agreement and an alleged oral agreement to remove a nearby icehouse. In *Fogelson v. Rackfay Construction Co.*, 300 N.Y. 334, 90 N.E. 2d 881 (1950) (Brief, pp. 5, 10, 12) there was a written lease and an alleged oral agreement to provide bus service for lessees. In *Plum Tree, Inc. v. N. K. Winston Corp.*, 351 F. Supp. 80, 82 (S.D.N.Y. 1972) (Brief, pp. 7-11) there was a written lease and an alleged oral agreement to provide "many things." In *Halloran v. N. & C. Contracting Co.*, 249 N.Y. 381, 164 N. E. 324 (1928) (Brief, p. 10) there was a written lease and an alleged oral agreement at exclusive rights to solicit business from other tenants.

These are factual situations where application of the parol evidence rule obviously is necessary to bar enforcement of wholly extraneous terms governing the sale or use of real estate. They are factual situations where, in the words of *Mitchill*, the parties would "ordinarily be expected to embody" the oral agreement in the writing and the oral agreement was "part and parcel" of "the principal transaction" and its "inducing cause" (247 N.Y. at 381-82). Whatever relevance Seagram's rambling discussion about "part and parcel" and "inducing cause" may have in context of the real estate transactions involved

there (Brief, pp. 6-21) it manifestly has no relevance whatever to the facts here.

The oral promise to relocate the three Lees is governed not by the *Mitchill—Fogelson* line of cases but instead by such cases as *Gem Corrugated* and *Hicks v. Bush*, 10 N.Y. 2d 488, 225 N.Y.S. 2d 34 (1962). The oral agreement to relocate and written agreement to sell Capitol City are analogous to the oral agreement to buy stock and written requirements involved in *Gem Corrugated* and the oral contract to raise money and written contract to buy stock involved in *Hicks v. Bush*. Indeed, the parol evidence rule does not operate to bar Seagram's oral promise for the same reasons that it was not applied in *Hicks v. Bush* (10 N.Y. 2d at 491, 225 N.Y.S. 2d at 37):

A certain disparity is inevitable, of course, whenever a written promise is, by oral agreement of the parties, made conditional upon an event not expressed in the writing. Quite obviously, though, the parol evidence rule does not bar proof of every orally established condition precedent, but only of those which in a real sense contradict the terms of the written agreement.

The trial court properly held that *Hicks v. Bush* refuted Seagram's contention below that the oral agreement "was in the nature of a condition precedent" since that fact, even if true, "will not alter the collateral nature of the agreements" (111a). It also refutes Seagram's present contention that the trial court relied upon *Hicks v. Bush* "in response to plaintiffs' urging" that it "precludes application of the parol evidence rule" (Brief, p. 16). *Hicks v. Bush* refutes Seagram's further contention that the subject matters of the oral and written agreements were "part

and parcel" (Brief, pp. 7, 9, 11-12) because there it was recognized there that "a certain disparity is inevitable, of course" but that the parol evidence bar applies only where there is a contradiction "in a real sense" (10 N.Y. 2d at 491, 225 N.Y.S. 2d at 37). Moreover, as the trial court stated, *Thomas v. Scutt*, 127 N.Y. 133, 140-41, 27 N.E. 961 (1891) stands for the proposition that "a collateral agreement is one which is 'separate, independent and complete . . . although relating to the same object'" (108a) (emphasis added).

For the same reasons also, Seagram is not helped by the contention that the oral promise was a "condition" of the written agreement (Brief, p. 8.). Unfortunately for Seagram, it can cite neither record annotations nor applicable case authority in support of any of these contentions or in support of its last-ditch argument that "as a matter of law, there is a presumption that the parties intended to integrate in this written contract every agreement relating to the nature or extent of their understanding" (Brief, p. 20).

In short, to apply the parol evidence rule here would, in the words of Judge Friendly, constitute a reversion to "the days when wooden application of the parol evidence rule was allowed to produce results contrary to the parties' intention." *Hellenic Lines, Ltd. v. United States*, 512 F. 2d 1196, 1209 (2d Cir. 1975). See also *Dalton v. Hamilton Hotel Operating Co.*, 210 App. Div. 407, 206 N.Y.S. 272 (1st Dep't 1924), *aff'd*, 242 N.Y. 481, 152 N.E. 268 (1926); *J. W. Mays, Inc. v. Hertz Corp.*, 15 A.D. 2d 105, 221 N.Y.S. 2d 776 (1st Dep't 1961); *Nationwide Mutual Ins. Co. v. Timon*, 9 A.D. 2d 1018, 194 N.Y.S. 2d 429 (4th Dep't 1959).

Seagram creates the erroneous impression that the jury considered two affidavits (48a-54a) which supposedly show

that the oral agreement "was integral to" and a "condition" of the written Sales Agreement and "part of the consideration" for it (Brief, pp. 8-9) and which supposedly contain a binding admission by counsel that "there was a single, indivisible transaction" (p. 14). Seagram never brought them to the jury's attention but instead used them only to support its summary judgment motion (39a-42a) and post-trial motion. On both occasions they were of so little moment they were ignored by the trial court and opposing counsel. They therefore have no relevance whatever to the jury's finding that the oral agreement was collateral to and not inconsistent with the written agreement. *Millerton Agway Coop. v. Briarcliff Farms*, 17 N.Y. 2d 57, 268 N.Y.S. 2d 18 (1966); *Hunt Foods and Industries, Inc. v. Doliner*, 26 A.D. 2d 41, 270 N.Y.S. 2d 937 (1st Dep't 1966).

This jury finding must stand on appeal because substantial evidence supports it. *Salem v. United States Lines Co.*, 293 F.2d 121 (2d Cir. 1961), *rev'd in part on other grounds*, 370 U.S. 31, 82 S.Ct. 1110 (1962). "So long as the evidence in the case has the minimal quality required to send the case to the jury, the jury's resolution of the factual issues will prevail," *Grey v. First National Bank in Dallas*, 393 F.2d 371, 381 (5th Cir.), *cert. denied*, 393 U.S. 941, 89 S.Ct. 398 (1968), unless it is "incredible." *Maillard v. American Export Isbrandtsen Lines, Inc.*, 406 F.2d 322, 324 (2d Cir. 1969).

The two affidavits were submitted by the three Lees in a retaliatory action brought by Seagram in Washington, D.C., and they convinced the district court there that Seagram's purpose of harassment, vexation and oppression mandated dismissal under the doctrine of *forum non conveniens* as codified in the District of Columbia Code (13 D.C. Code

§ 425) and 28 U.S.C. § 1404. Accordingly, statements by counsel that the oral agreement was "part" and a "material term" of the written agreement (Seagram Brief, p. 8, n. 6) made in that context have no probative value whatever, on the wholly alien issue of the parol evidence rule. It is an important rule of substantive law designed to prevent enforcement of fraudulent claims, *Smith v. Bear*, 237 F.2d 79, 83 (2d Cir. 1956), whereas forum non conveniens is an important procedural rule designed to prevent vexatious litigation. *Thomson v. Palmieri*, 355 F.2d 64 (2d Cir. 1966). Thus, the concepts "part" and "material term" are used in such vastly different senses under the two doctrines that the affidavits could not possibly have admitted into evidence on the parol evidence issue had Seagram tried to introduce them. Seagram's election not to do so but instead to limit use of them to the motion practice now makes them irrelevant. Appellate courts "ordinarily . . . will not consider . . . matters of record . . . in another distinct phase or part of the litigation" or "matters not offered or introduced into the evidence in the lower court." 5 C.J.S. *Appeal & Error* §§ 1481, 1488 (pp. 754, 779).

POINT III

The oral contract is sufficiently definite and hence enforceable under the New York law.

Seagram's argument that its oral contract with the three Lees "is so vague and indefinite as to be unenforceable" (Brief, Point II, pp. 22-31) ignores facts of record fully supporting the jury's findings concerning (1) the intent of the parties and (2) the specific contours of Seagram's promise to provide the three Lees—within a reasonable time not to exceed one year—with the opportunity to ac-

quire a geographically acceptable Seagram distributorship approximately half the size and profitability of Capital City. Seagram thus seeks appellate reversal of these jury findings *as a matter of law* through a judicial redrafting of the Lee-Seagram agreement into something wholly different than that found by the jury.

Seagram's claim about the supposed impossibility of determining *in advance* which of several houses might be "acceptable" to the three Lees turns the Lee-Seagram agreement on its head. Its obligation was in good faith to provide an opportunity for the three Lees to select—from a finite range of available houses—a house which would be sufficiently acceptable so that they could commence negotiations with a third party. It was never claimed that Seagram was required to act as a clairvoyant who must predict the success or failure of such third-party negotiations.

Moreover, as the trial court held (103a), the implicit term as to good faith performance covered both the three Lees and Seagram, *Wood v. Duff-Gordon*, 222 N.Y. 88, 91 (1917), so the theoretical possibility that they might have breached that term has no bearing whatever on the issue here of whether the contract was sufficiently definite to allow for Seagram's performance in good faith. Thus, in *Vineyard v. Martin*, 29 N.Y.S. 2d 935 (Sup. Ct. N.Y. Co. 1941), a broad discretionary option was granted to terminate an obligation to procure funds if such endeavor "in the sole judgment of defendants" should appear unwise or inexpedient, but the contract nonetheless was enforced because "[i]n every contract there exists an implied covenant of good faith and fair dealing" (29 N.Y.S. 2d at 938). See also, *Barnard Bakeshops v. Dirig*, 19 N.Y.S.2d 224 (Sup. Ct. Broome Co. 1940); *Consolidated Blasting Corp. v. Colabella Bros., Inc.*, 168 N.Y.S. 2d 275 (Sup. Ct. N.Y. Co. 1957).

Seagram does not and cannot challenge the uncontroverted facts of record about the terms of the Lee-Seagram agreement (pp. 11-13, *supra*) in its brief. However, its basic contention about its "inability" to "understand" its obligation merely creates factual issues as to the weight of the evidence rather than issues of law. Those factual issues properly were resolved against Seagram because the testimony by the Lees and by Mr. Yogman himself was that Yogman repeatedly recognized Seagram's obligation and gave assurances that he was seeking a house under a deadline of July 31, 1971 (265a, 267a, 341a-343a, 345a-346a, 348a, 388a-389a, 409a, 416a-420a, 433a). At no time during his deposition or at the trial did Yogman profess an inability to understand the obligation. To the contrary, Yogman testified (341a-342a):

Q. In words or substance, can you recall what you said to him [Harold Lee] when he raised this subject of possibly finding another house for his sons? A. Yes. I said, "We'll do what we can. Should we hear of anything we will let you know. *Should we hear of anything within the area you would like the boys to live in, that the house is large enough to support the two boys, that it is something you can afford from the proceeds of Capitol City.*" [Emphasis added.]

Mr. Yogman also testified that he told Arthur Lee that "if something should become available *within his* [Harold Lee's] means and something that he wanted to do, I would let him know" [emphasis added] (365a). Furthermore, Yogman experienced no difficulty whatever in setting up the Lees' appointment with Mrs. Fine in 1974 in regard to the possible sale of Colonial Liquors in Brockton, Massachusetts (365a), and over the years Seagram assisted a number of its former employees in acquiring distributorships, including Harold Lee and Chester Carter at Capitol

City (336a, 344a, 351a-352a). Thus "acceptability" was a very familiar concept to Seagram (375a-378a, 390a-395a). Indeed, Yogman testified that he told Lester Lee that Seagram's president Edgar Bronfman might not want the Lees to have another house but that "I have gotten around Edgar Bronfman before, and I think I can do it . . . again" (173a). That testimony, of itself, refutes that Seagram's breach was caused by its "inability" to understand its obligation.

Nor did Mr. Yogman have difficulty "understanding" comparable situations requiring Seagram's close involvement in the availability of distributorships such as those in Providence, Trenton and Minneapolis (261a, 266a, 336a, 339a, 354a, 355a, 423a, 424a). A prime example is the Paley house in Providence because Yogman testified that "we felt that we would leave the Paley house available holding up the sale of the house to anyone" in order to reduce the number of Seagram distributorships in the Boston area (261a). During Yogman's 18 years with Seagram (328a) he worked closely with distributors and even formed a "counseling service" to improve their performance (329a). These 454 distributors are the life-blood of Seagram in 32 of the 50 states (330a-333a, 344a, 355a-356a), and their duties are carefully regulated under annual franchise contracts which grant Seagram the right to approve or disapprove transfers of its franchises (Pl. Exs. 10-11, E 40-E 57). Yogman sufficiently grasped the fiscal aspects of their operations to have worked out a formula for evaluating them (268a-269, 353a-354a) and to give his snap judgment as to evaluating the good will of Capitol City during the negotiations between the five Lees and Seagram (339a-340a, 353a, 428a).

In short, Yogman was thoroughly familiar with Seagram's distributorships.

Mr. Yogman also knew the needs and desires of the three Lees based upon years of working closely and intimately with them (124a-125a, 139a, 157a, 159a-163a, 436a). The fact that the first two houses Yogman mentioned (Paley's in Providence and Galenson's in Minneapolis) were satisfactory to Harold Lee (380a) eliminated at the outset any conceivable "difficulty" Yogman could have had in understanding what was "acceptable" to the three Lees. These hard facts of record demonstrate that the Lee-Seagram agreement was simple in its essential elements and was easily understood by Seagram.

Seagram argues in effect that what is involved here is a complex purchase-and-sale agreement calling for extensive detail as a prerequisite to enforceability. Its purpose is to obscure its obligation by attempting to fuse it with the requirements of the expected contract between the Lees and a third-party distributor. The trial court had little difficulty in dissipating this supposed obscurity (102a):

The instant contract found by the jury was a simple agreement and was not, as defendant alleges, tantamount to a complex purchase and sales agreement. Liquor distributors are independent business people who hold franchises from the various distillers such as Seagram. . . . In most cases . . . Seagram would have neither occasion nor necessity to enter into a contract which is the functional equivalent of a purchase and sales agreement, since it holds no ownership interest. The Court would be straining unduly to adopt the theory of the contract suggested by defendant.

Seagram's duty under the alleged agreement was merely to notify plaintiffs as they learned of distributors who were considering the sale of their businesses. Thus, the subject matter of the alleged agreement was quite clear. . . .

Seagram's erroneous premise that a complex sales agreement was required makes most of its discussion of the case law inapposite. In *Sivera v. Safra*, 79 Misc. 2d 919, 361 N.Y.S. 2d 250 (Sup. Ct. N.Y. Co. 1974) (Brief, p. 30) an oral contract to obtain "additional financing" was not enforced, in significant part, because the parties ignored vast numbers of technical specifications.* In *Transamerica Equipment Leasing Corp. v. Union Bank*, 426 F.2d 273 (9th Cir. 1970), (Brief, p. 30, n. 26) a loan agreement was not enforced because it "requires making a number of assumptions about the essentials of a complex type of financing transaction" (426 F.2d at 275). In *Lucas v. Federal Reserve Bank of Richmond*, 59 F.2d 617 (4th Cir. 1932) (Brief, p. 30, n. 26) a detailed financial contract was not enforced because it "does not show the amount of credit to be extended, the period of the credit, the amount or kind of security to be deposited as collateral, or the interest to be paid" (59 F.2d at 619). *Garcin v. Granville Iron Corp., Inc.*, 137 Misc. 648, 244 N.Y.S. 145 (Sup. Ct. N.Y. Co. 1930) (Brief, p. 30), and *Mason v. Rose*, 85 F. Supp. 300 (S.D. N.Y. 1948), *aff'd*, 176 F.2d 486 (2d Cir. 1949) (Brief, p. 29) also involved complex financing agreements.

The *Sivera-Transamerica* line of cases is of no relevance here because any "complex" financing transaction which would have remained had Seagram fulfilled its agreement would have been between the three Lees and the owners of the distributorship and not, as Seagram argues, in the far more limited context of the Lee-Seagram agreement (Brief,

* *Sivera* also is irrelevant because the agreement there was not only vague but also illusory and palpably contrary to public policy, and *Bushwick-Decatur Motors v. Ford Motor Co.*, 30 F. Supp. 917 (E.D.N.Y.), *aff'd*, 116 F.2d 675 (2d Cir. 1940) (Brief, p. 31) is irrelevant because it was decided under Michigan law.

p. 24). Instead, as the trial court held (100a-101a), the controlling principle under New York law is that a contract must be construed, if possible, in such a manner as to render it enforceable. *Silverman v. Alpart*, 282 App. Div. 631, 125 N.Y.S.2d 602, 605 (3d Dep't 1953); *M. O'Neil Supply Co. v. Petroleum Heat and Power Co.*, 280 N.Y. 50, 19 N.E. 2d 676 (1939); *Vineyard v. Martin*, 29 N.Y.S. 2d 935 (Sup. Ct. N.Y. Co. 1941).

For example, in *Vineyard* the court enforced an agreement to procure third-party loans required to complete construction of an airplane. After distinguishing between a general underlying agreement (the counterpart of Seagram's obligation to make a distributorship available to the Lees) and a more specific future contract (the counterpart of the agreement to purchase between the Lees and owners of the distributorship), the court rejected the contention that the procurement agreement was too vague and indefinite because "[t]he fact that the contract does not prescribe the form or duration or the term of the notes or the rate of interest does not make it so indefinite that no action may be based thereon" (29 N.Y.S. 2d at 937).

The trial court also correctly recognized that, in furtherance of the rule which validates contracts whenever possible, New York courts have held that this may be done by reference to "extrinsic data" (102a-103a). *St. Joseph's Immigrant Homes, Inc. v. Seaman*, 281 N.Y.S. 2d 143 (Civ. Ct. N.Y. Co. 1967); *Metro-Goldwyn-Mayer, Inc. v. Scheider*, 25 Misc. 2d 418, 347 N.Y.S. 2d 755 (Sup. Ct. N.Y. Co. 1972). Since the New York test of a contract's enforceability is whether it "is sufficiently definite and explicit so that the intention of the parties may be ascertained to a reasonable degree of certainty," *Castelli v. Tolibia*, 83 N.Y.S. 2d 554,

563-64, (Sup. Ct. N.Y. Co. 1948), *aff'd*, 276 App. Div. 1066, 96 N.Y.S. 2d 488 (1st Dep't 1950), the prior course of conduct between the three Lees and Seagram also must be given great weight.

In *Castelli* an oral contract dispositive of plaintiff's claims against certain corporate assets was to serve as a substitute for plaintiff's preexisting rights in the same manner as the Lee-Seagram agreement was to provide the Lees with a potential substitute for *their* preexisting financial interest in Capitol City. The court stated (83 N.Y.S. 2d at 563-64):

A contract cannot be ignored as meaningless, except as a last resort. "Indefiniteness must reach the point where construction becomes futile." *Cohen & Sons v. M. Lurie Woolens Co.*, 232 N.Y. 112, 114, 133 N.E. 370, 371. Nor can a contract be rejected as uncertain, if it can be rendered certain by reference to something certain. . . .

In *Feldman v. Rockaway News Supply Company*, 157 N.Y.S. 2d 671 (Sup. Ct. N.Y. Co. 1956), an arbitration award referring to performance of work "in the manner in which it was done in the past" was enforced on the ground that "an agreement 'is not too indefinite if it can be made certain by reference to outside matters'" (157 N.Y.S. 2d at 675). In *Borden v. Chesterfield Farms, Inc.*, 27 A.D. 2d 165, 277 N.Y.S. 2d 494 (1st Dep't 1967), oral contracts concerning establishing and financing milk delivery routes which had no terms as to credit and quantities were enforced on the ground that "the prior course of dealings between the parties" enabled the jury properly to find the existence of valid contracts "on the terms and conditions

established by the practical experience" (277 N.Y.S. 2d at 495-96). In *Metro-Goldwyn-Mayer v. Scheider*, 25 Misc. 2d 418, 347 N.Y.S. 2d 755 (Sup. Ct. N.Y. Co. 1972), the fact that there was no explicit date for commencing services was held "not dispositive" because defendant's agreement was "instinct with an obligation" to report on time (citing *Wood v. Duff-Gordon*, 222 N.Y. 88, 91 (1917)) and because there was sufficient evidence "as to the custom and practice of the industry" and "the understanding of the parties" (347 N.Y.S. 2d at 761).

Seagram's reliance upon *Allen & Company v. Occidental Petroleum Corp.*, 382 F. Supp. 1052 (S.D. N.Y. 1974), *aff'd*, 519 F.2d 788 (2d Cir. 1975) (Brief, p. 30) is totally misplaced. Although it affirmed Judge Weinfeld's opinion on other grounds, this Court held that "[t]he district court's conclusion that the contract, if in fact supported by the requisite contractual intent, was in any event unenforceable for lack of certainty in its terms is therefore probably in error as a matter of law" (519 F.2d at 789, n.1). However, Judge Weinfeld's careful analysis in *Allen* is highly relevant because—consistently with the trial court's reliance upon "extrinsic data" (102a)—it states that if the parties intended to enter into a binding contract, a question of fact is created: "[A]re there sufficiently objective criteria whereby a court can determine—in effect, fill in—the blank or open terms?" (382 F. Supp. at 1057).

Seagram makes a highly verbalistic argument designed to fabricate "error" in the trial court's jury instructions or some "contradiction" between them and the court's opinion and thus to create a "fatal" conflict between (1) "provide" as used in the trial court's instruction and (2) "notify" as used in its opinion (Brief, pp. 26-29). There is no error

or contradiction. In the instructions "provide" was combined with a contrapuntal useage of "find" (452a-455a), and in context of this record "to provide" means "to look out for in advance", and "to afford" or "to contribute" rather than physically "to give or furnish" as Seagram contends (*Webster's New International Dictionary, 2d Edition, Unabridged*, 1961, p. 1994).^{*} Nor is there any conflict in Harold Lee's use of "relocate". Seagram uses the word in the sense of physically to "set or establish [the Lees] in a particular spot or place" (Brief, p. 27) instead of its proper sense "to designate the site or place of" (*Id.*, p. 1449).

In sum, the instructions clearly described Seagram's obligation as one to use its influence and industry knowledge in order to find an available house, to provide (i.e., afford) to the three Lees by proper notice the opportunity to acquire this house, and thus to assist in directing them to a new place.

This analysis and the facts of record also refute Seagram's arguments that it somehow was transformed from a distiller and supplier of alcoholic beverages into a business broker or finder (Brief, p. 28) and that its obligation might have been to commit larceny as defined by the N. Y. Penal Law § 155.05 (Brief, p. 24, n.18). The trial court properly rejected the former contention (112a-114a) and the latter contention was never seriously pressed below.

^{*} The opinion's reference to Seagram's duty "to notify" (102a) is perfectly consistent with, and indeed a natural extension of, its duty to "find" or "provide" as defined above. "Notification" has no meaning unless there is something to notify about and "finding" or "providing" has no meaning unless the Lees were notified of what was to be found or provided.

POINT IV

The jury's damage award of \$407,850 was based upon competent proof and a reasonable measure of damages.

Seagram attacks the damage evidence of the three Lees as incompetent because it supposedly (A) is based upon an agreement insufficiently certain, (B) is not related to an existing distributorship, and (C) is incorrectly based on loss of profits as a measure of damages (Brief, Point III, pp. 32-37). However, each attack dissolves into a petty hassle over whether damages might have been proved differently. Like most defendants on appeal, Seagram now can think of other theories of damage, but its election not to introduce any damage evidence whatever during the trial bars this Court from overturning the jury's verdict as to damages. This is so because there was competent evidence upon which reasonable men could have arrived at the damage award, *Simblest v. Maynard*, 427 F.2d 1 (2d Cir. 1970), and because there were at least two ways in which the jury could have computed the award (p. 46, *infra*). For the same reasons, Judge Tenney's ultimate conclusion as to damages also cannot be disturbed (121a-22a):

[T]he instant jury had before it competent proof of damages sufficient to allow it to make such just and reasonable inferences as the evidence warranted.

A. Certainty of the Agreement.

Seagram's vagueness point on damages (Brief, pp. 32, 36-37) actually is a rehash of its arguments considered in the preceding point. The obvious answer is that if an agreement is sufficiently certain to be enforced, it must follow that it also is sufficiently certain to provide a basis

for computing damages and that any difficulties in computing damages will not bar proof of estimated damages based upon reasonable calculations. *Bigelow v. RKO Radio Pictures, Inc.*, 327 U.S. 251, 66 S. Ct. 574 (1946); *Wakeman v. Wheeler & Wilson Mfg. Co.*, 101 N.Y. 205 (1886). Thus Seagram's vagueness argument does not rise to the level of a meaningful challenge to plaintiffs' evidence on damages because, as Judge Tenney held (121a):

[W]here there is a contract and the breach thereof causes harm to a plaintiff and the only difficulty is in measuring the harm, the law will not allow a defendant to escape liability merely because the fixing of damages is difficult or imprecise. *For Children, Inc. v. Graphics International, Inc.*, *supra*, 352 F. Supp. 1280; *Wakeman v. Wheeler & Wilson Manufacturing Co.*, 101 N.Y. 205 (1886).

Seagram cites *Koufman v. IBM*, 295 F. Supp. 784 (S.D. N.Y. 1969) on its vagueness point but it is wholly irrelevant because it was decided on a motion for summary judgment. Its holding that the agreement involved there was too vague to be enforced could not reach the damage proposition Seagram has framed (Brief, p. 32) because no evidence on damages was before the court.

B. The Damage Model.

Seagram is unhappy about the three Lees' decision to base their damage model upon their own experience at Capitol City and as individuals. It suggests that the damage model should have been selected from among nine existing Seagram houses—even though none was ever offered to the three Lees—and the estimated profits which it would have realized (Brief, p. 33). However, that sug-

gestion merely highlights Seagram's failure to take advantage of this supposed opportunity at the trial and the inability of the three Lees to construct such a damage model solely because of Seagram's breach. Quoting from *Bigelow v. RKO Radio Pictures, Inc.*, 327 U.S. 251, 264, 66 S.Ct. 574 (1946), Judge Tenney held that "defendant has by its breach 'rendered difficult the ascertainment of the precise damages suffered'" (119a) and thus provided one dispositive answer to Seagram's suggestion. Another is that "[t]he [damage] issue was not raised at the trial nor was such evidence introduced and appellants may not rely thereon on this appeal," *Randall-Smith, Inc. v. 43rd St. Estates Corp.*, 23 A.D.2d 835, 259 N.Y.S.2d 722, 723 (1st Dep't 1965), *rev'd in other grounds*, 17 N.Y.2d 99, 215 N.E. 2d 494 (1966).

Seagram's suggestion also has a hollow sound because the financial data of the nine listed distributorships were available to Seagram but not the three Lees. Under these circumstances the burden was on Seagram to introduce the data. *Spitz v. Lesser*, 302 N.Y. 490, 99 N.E. 2d 540 (1951). Moreover, specific proof as to an identifiable business—or as Seagram would have it, a comparison with someone else's "existing houses" (Brief, p. 33)—was not necessary because evidence sufficient to permit estimates of probable profits with a reasonable degree of accuracy is all that the law requires. *Perma Research & Development Co. v. Singer Co.*, 402 F. Supp. 881, 898, 900 (S.D. N.Y. 1975); *William Goldman Theatres v. Loew's, Inc.*, 69 F. Supp. 103, 108 (E.D. Pa. 1946), *aff'd*, 164 F.2d 1021 (3rd Cir.), *cert. denied*, 334 U.S. 811, 68 S.Ct. 1016 (1948). The appropriate standard, as embodied in the oral agreement itself, was the three Lees' "existing" distributorship during the years they owned it.

C. Loss of Profits as the Standard.

The holdings in *Perma Research* and *William Goldman* also show that the jury's finding as to damages is supported by the generally-accepted principle that damages, including all lost past and future profits proximately caused by a breach of contract, may be established by proof on any reasonable basis. See also, *Flexitized, Inc. v. National Flexitized Corp.*, 335 F.2d 774 (2d Cir. 1964), *cert. denied*, 380 U.S. 913, 85 S.Ct. 889 (1965); *For Children, Inc. v. Graphics International, Inc.*, 352 F. Supp. 1289 (S.D. N.Y. 1972); *Borden v. Chesterfield Farms*, 27 A.D. 2d 165, 277 N.Y.S. 2d 494 (1st Dep't 1967); *Ornstein & Son Watch Case Co. v. Dantzig*, 190 App. Div. 452, 180 N.Y.S. 55 (1st Dep't 1920); *Wakeman v. Wheeler & Wilson Mfg. Co.*, 101 N.Y. 205 (1886); *Dart v. Laimbeer*, 107 N.Y. 664 (1887).

Seagram argues that "the damage evidence was incompetent in that it was based upon the measure of damages for destruction or injury to a business rather than upon the measure of damages proper for a breach of contract to sell or to provide a business for sale" (Brief, p. 33). The trial court gave the dispositive answers to that argument by citing *For Children* and *William Goldman* for the proposition that "the loss of profits which are the direct and proximate result of the breach is the proper measure of damages" (117a), and by reviewing the "successful history" of the three Lees, the availability of capital, and the other factors which made it "entirely foreseeable" that Seagram's breach would cause the three Lees to suffer "the loss of profits from the anticipated venture" (117a-118a).

In *Wakeman v. Wheeler & Wilson Mfg. Co.*, 101 N.Y. 205 (1886), the Court of Appeals approved proof of profits plaintiff would have made had defendant performed its

promise (by providing a sewing machine agency in Mexico) where plaintiff relied upon estimates based on prior sales records, the number of sales offices and the population served. It was held (101 N.Y. 209-10):

One who violates his contract with another is liable for all the direct and proximate damages which result from the violation They are nearly always involved in some uncertainty and contingency; usually they are to be worked out in the future, and they can be determined only approximately upon reasonable conjectures and probable estimates

New York courts frequently apply concepts of damages used in federal antitrust cases in breach-of-contract cases. Indeed, in *342 Holding Corp. v. Carlyle Construction Corp.*, 31 A.D. 2d 605, 295 N.Y.S. 2d 248 (1st Dep't 1968), the court cited *Eastman Kodak Co. of New York v. Southern Photo Materials Co.*, 273 U.S. 359, 378, 47 S.Ct. 400, 405 (1927), for a principle which actually had been framed years earlier in *Wakeman*, namely that "loss of profits need not be proven to an exactitude, but can be sustained as reasonably supported by the evidence" (295 N.Y.S. 2d at 249). In *Spitz v. Lesser*, 302 N.Y. 490, 99 N.E. 2d 540 (1951), *Bigelow v. RKO Radio Pictures, Inc.*, 327 U.S. 251, 264-65, 66 S.Ct. 574, 580 (1946), was cited for the principle that approximation is warranted because the wrongdoer rather than the victim must bear the risk of uncertainty. In *Madison Pictures v. Pictorial Films*, 151 N.Y.S. 2d 95 (Sup. Ct., N.Y. Co. 1956) (where contractual obligations were based upon a relationship of trust and confidence similar to that which existed between Jack Yogman and Harold Lee) the court adopted both measures of damages now criticized by Sea-

gram on the basis of *Eastman Kodak*, *Bigelow*, *William Goldman*, and numerous other leading antitrust cases on damages (151 N.Y.S. 2d at 127-30). These cases are dispositive of Seagram's contention that the three Lees "erroneously adopted an amalgam of the 'before and after' and 'yardstick' measures of damages born of antitrust litigation" (Brief, p. 34).

The three Lees proved their lost profits in the traditional manner by comparing the profits of their own business investment before and after the breach. While this method is similar to the "before and after" test, it is the standard normally used in contract cases. *Wakeman v. Wheeler & Wilson Mfg. Co.*, 101 N.Y. 205 (1886); *Dart v. Laimbeer*, 107 N.Y. 664 (1887); *Mortimer v. Bristol*, 190 App. Div. 452, 180 N.Y.S. 55 (1st Dep't 1920). Moreover, Seagram's attack on the "yardstick" concept must fail because that technique simply was not used here. But even if the three Lees in fact had used an "amalgam" of the "before and after" and "yardstick" tests, that circumstances would be of no import. Seagram's sly suggestion that only one of the two theories must be used is erroneous because no one theory is sacrosanct, *Spitz v. Lesser*, 302 N.Y. 490, 493-94 (1951); *Madison Pictures v. Pictorial Films*, 151 N.Y.S. 2d 95, 128 (Sup. Ct. N.Y. Co. 1956), and because the Supreme Court gave its blessing to the use of both theories in *Bigelow*.

The three Lees proved their damages through Ernest L. Sommer, an experienced certified public accountant whom the trial court found to be "duly qualified at trial as an expert with experience in evaluating business investments in general and liquor distributorships in particular" (119a). Proof of damages through such an expert, of course, is the normal method used where a promised business opportunity

was not provided. *Lieberman v. Nagel*, 316 F.2d 214 (9th Cir. 1963); *Hazard Lewis Farms v. State*, 1 A.D.2d 923, 149 N.Y.S.2d 658 (3d Dep't 1956). The trial court summarized Mr. Sommer's proof in meticulous detail (119-120a) and we respectfully direct the Court's attention to that summary.

The trial court commented that the jury apparently arrived at the amount of the damage award by employing "a critical eye in viewing the evidence on damages" (122a). It could have arrived at its verdict on damages by a different route because the four elements set forth in Mr. Sommer's summary of damages (Pl. Ex. 48, E 94, 95) show that the jury could have reached a final figure of \$407,888 as damages—only \$38 more than the actual award of \$407,850—by excluding (a) future damages and (b) 50% of the amount shown for "lost return on investment" and "loss of increase in good will." This analysis also is dispositive of Seagram's complaint about contentions made below by the three Lees (1) that the proper measure of lost profits was before-taxes profits, and (2) that they should recover future damages profits and compensation lost subsequently to June 1, 1975 (Brief, pp. 34-35). Both contentions were supported by expert testimony (290a-295a, 311a-313a, 320a-322a), neither was rebutted by expert or any other testimony and, as the trial court noted, the jury's verdict was less than half of the total damages supported by the evidence (120a).

Seagram's argument that its failure to provide the three Lees with a liquor distributorship resulted in no damage since the value of any such distributorship "cannot be shown or assumed to be greater than the price plaintiffs would pay for it" (Brief, p. 34) must fail because facts of record show that Seagram distributorships were unique

businesses open only to a select few (356a-357a), had unique profit potentials (133a) and required Seagram's approval of any transfer of its franchises (356a). These unique characteristics show that the price of a Seagram distributorship did not and could not reflect its "market" value or future profit potential as Seagram contends.

Seagram challenges the propriety of comparing the return on investment in a distributorship with the return on such a "low risk" investment as Seagram AAA bonds (Brief, p. 35) even though it introduced absolutely no evidence establishing that such investments were improper or constituted insufficient mitigation of damages. Indeed, the record shows that the value of plaintiff's "low risk" bond investment actually decreased by 15% between the time of investment and the time of trial (Tr. 347, Pl. Ex. 40), although this decrease was not claimed as an element of damages. Moreover, Seagram's proposed comparison between the rate of return after taxes on Capitol City or the "hypothetical new house" and the rate of return before taxes on plaintiffs' Seagram AAA bonds (Brief, p. 35) is totally invalid. It makes the unwarranted assumptions that the three Lees' new distributorship would operate in corporate form rather than through some form of proprietorship as suggested by the record (311a) and that distributions to the three Lees would be in the form of dividends only.

Seagram's argument that lost salaries and fringe benefits are not a measure of damage because it had no obligation to employ Eric and Lester Lee (Brief, p. 36) is the rankest type of sophistry because loss of salary and benefits manifestly resulted directly from Seagram's failure to give the Lees an opportunity to purchase a liquor distributorship.

Moreover, Seagram simply has no standing on this appeal to enmesh this Court in the totally irrelevant matter of whether the tax liability of the two other Capitol City owners would have been affected by the tax posture of the three Lees (Brief, pp. 35-36). Seagram's innuendoes are completely dissipated by facts of record which show that *all* five prior owners were represented by this law firm in this litigation until Seagram's counterclaims were dismissed before trial.

CONCLUSION

For the foregoing reasons plaintiffs-appellees urge the Court to affirm the denial of the post-trial motion of defendant-appellant seeking judgment notwithstanding the verdict.

Dated: New York, New York
October 21, 1976

Respectfully submitted,

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Service of ~~three~~ ③ copies of the within BRIEF
is admitted this 21st day of Oct. 1976

White Case